

Franchise Tax Board Proposed Regulation 19044

Section 19044 is adopted to read:

§19044. Protest Hearing.

(a) General. A taxpayer has a right to have an oral hearing on its protest. There is no requirement that an oral hearing be held on a protest, except as requested by the taxpayer. This regulation describes the mechanics of requesting and scheduling an oral hearing, the nature and manner in which the hearing is conducted, and the rights and obligations of the taxpayer in regards to an oral hearing.

(b) Request for Hearing.

(1) If the taxpayer wishes to have an oral hearing on a protest, it must include a request for oral hearing in the original protest. If a request for an oral hearing is not made in the original protest, the taxpayer's right to an oral hearing is waived. However, the department, in its discretion, may grant an oral hearing though not requested in the original protest. See subsection (b)(2) of this regulation and subsection (d)(3) of Regulation 19041. A taxpayer may not perfect, amend or supplement an original protest to request an oral hearing.

(2) In its discretion, the department may grant a request for an oral hearing made subsequent to the filing of the original protest.

(A) The department shall be liberal in granting a request for an oral hearing made after the original protest was filed consistent with timely and efficient administration.

(B) A request for an oral hearing, not contained in an original protest, will be granted whenever the department requests additional information (see Regulation 19041, subsection (g)) if the request for an oral hearing is made prior to the date set for a timely response to the request for information.

(3) A taxpayer is entitled to only one hearing. However, additional hearing(s) may be scheduled at the discretion of the department.

(4) A taxpayer may waive an oral hearing after a request has been made.

(c) Location.

(1) A taxpayer is entitled to request an oral hearing at an office of the department which is convenient to the taxpayer. (Section 21011(a), Revenue and Taxation Code.) When possible, such requests shall be granted.

(2) If it is not possible to schedule an oral hearing at an office of the department which is convenient to the taxpayer, the location of the hearing shall be determined by the department.

(3) An oral hearing may be conducted by telephone, videoconferencing, or similar means if the taxpayer, or the taxpayer's representative, consents.

(4) A taxpayer or, if applicable, a taxpayer's representative who does not provide sufficient notice of inability to attend an oral hearing or does not attend an oral hearing (see subsections (d)(5) and (6) of this regulation, may have the hearing scheduled for Sacramento.

(d) Time.

(1) Hearings will be scheduled as soon as possible after the filing of the protest. Factors to be taken into consideration in the scheduling of an oral hearing include the workload of the department, the schedules of the hearing officers, the schedule of the taxpayer or the taxpayer's representative, and the amount of further development of the protest which the hearing officer determines is necessary.

(2) The time and date of an oral hearing on a protest shall, when possible, be established by mutual agreement of the taxpayer, or the taxpayer's representative, and the hearing officer. In no event shall the date of an oral hearing be less than 30 days from the date that a notice of hearing is mailed, unless the taxpayer, or the taxpayer's representative, agrees to an earlier date. If a mutual agreement can not be reached as the time and date of an oral hearing, the hearing officer will determine the time and date of the hearing.

(3) Hearings shall be scheduled Monday through Friday during normal business hours for the office where the hearing is to be held (generally between 8:00 a.m. and 4:30 p.m.). The length of time available for an oral hearing is not unlimited and the taxpayer, or the taxpayer's representative, shall advise the hearing officer of the length of time the hearing is expected to take.

(4) An oral hearing may be rescheduled one time if requested by the taxpayer, or the taxpayer's representative. A request to reschedule an oral hearing shall be made in writing and received by the department at least one week prior to the date of the requested hearing. Any additional rescheduling is at the discretion of the hearing officer.

(5) In the event the taxpayer, or the taxpayer's representative, does not provide written notice to the hearing officer at least one week prior to the date of an oral hearing of an inability to attend the hearing, then the hearing may, at the department's discretion, be rescheduled.

(6) A taxpayer or, if applicable, a taxpayer's representative, who does not appear at the scheduled hearing shall be deemed to have waived an oral hearing unless good cause exists for the failure to appear and a statement as to the cause is provided to the department as soon as is practical. See subsection (i) of this regulation.

(e) Notice. A written notice of the time, date and location of the hearing will be mailed to the taxpayer, or the taxpayer's representative, at the address provided by the taxpayer or the taxpayer's representative. The address provided in the original protest shall be presumed to be the

correct address unless the taxpayer, or the taxpayer's representative, submits a timely written notification to the department of a change of address.

(f) Hearing Officer.

(1) The department shall designate a member of its staff as the hearing officer for the protest. The department may change the designation of the hearing officer in its sole discretion at any time.

(2) The hearing officer shall have the authority to conduct the oral hearing.

(g) Representation.

(1) Taxpayers shall be informed prior to any hearing of the right to have a designated agent (representative) at an oral hearing.

(2) A designated agent may be any person of the taxpayer's choosing including, but not limited to, an attorney, accountant, bookkeeper, employee, consultant or business associate.

(3) The department shall recognize any representative who is identified by the taxpayer in writing or personally at the hearing.

(4) If the taxpayer is not present at the hearing, the representative may be required to submit proof that the representative is legally authorized to represent the taxpayer. Evidence may be in the form of a power of attorney, a copy of correspondence from the taxpayer relating to the protest which designates the individual as a representative, or the original protest filed by the representative.

(h) Conduct of the Hearing.

(1) Hearings will be Conducted in an Informal Manner. The purpose of hearings is to allow the hearing officer and the taxpayer, or the taxpayer's representative, to explore the issues raised by the protest, develop the factual basis of the protest, and to consider authorities relevant to the determination of the protest. An oral hearing should enable the hearing officer to have an understanding of the taxpayer's position so that an informed determination can be made with respect to the protest.

(2) Reasonable Accommodations. The department will provide reasonable accommodations to any taxpayer, or the taxpayer's representative, who is physically disabled and requires such accommodations to facilitate the hearing process. Taxpayers, or the taxpayers' representatives, should notify the department a minimum of 15 days prior to the hearing date of the need for reasonable accommodations to allow the department a reasonable time to arrange for such accommodations.

(3) Language Assistance. A taxpayer may receive language assistance at an oral hearing. The assistance may be provided by:

(A) an interpreter supplied by the taxpayer, or the taxpayer's representative,

(B) by a member of the Franchise Tax Board staff, other than the hearing officer, if available at the location of the hearing; or

(C) by a certified language interpreter.

(D) A taxpayer requesting the department to supply language assistance services under subsections (B) or (C) above, shall submit the request at least 15 days prior to the hearing. If the taxpayer requests a certified language interpreter pursuant to subsection (C) above, one will be supplied if possible. It is the taxpayer's responsibility to pay for the service either before or at the time it is provided. If the services of a certified language interpreter are requested and the taxpayer fails to appear at the hearing, or notifies the hearing officer at least one complete business working day prior to the hearing that the services of the certified interpreter are not required, the taxpayer will be responsible for the minimum service charge of such certified interpreter.

(E) A person providing language assistance will not be considered a representative for purposes of subsection (h)(4) of this regulation unless so designated.

(4) Representation. A taxpayer may designate a person or persons, as the case may be, to represent the taxpayer at the hearing. The hearing officer may limit the number of representatives for the taxpayer at a protest hearing. The hearing officer shall have broad discretion to allow more than one active representative at the hearing if in the hearing officer's judgment this does not cause a disruption of the hearing.

(5) Confidentiality. Hearings are part of the administrative process of the department and are covered by the confidentiality provisions of the Revenue and Taxation Code and other provisions of law.

(A) No one, other than the taxpayer, persons authorized by the taxpayer, and staff of the department are permitted to attend an oral hearing.

(B) Observers, other than staff of the department, are not allowed at hearings unless the taxpayer expressly consents to their presence in writing and there is sufficient space in the room in which the hearing is being held to accommodate them.

(6) Official Record or Transcript. Except as otherwise provided in subsection (h)(7) of this regulation, the department does not record or prepare a transcript of hearings. An official record is not maintained of documents submitted or statements made during the course of an oral hearing. Any subsequent proceedings, whether before the Board of Equalization or in the courts, proceed on a *de novo* basis.

(7) Recording an Oral Hearing.

(A) If the department determines that an oral hearing should be recorded by any means, it will provide written notice to the taxpayer, or the taxpayer's representative, at least one week prior to the hearing. The taxpayer, or the taxpayer's representative, is entitled to receive a copy of the recording of the hearing upon request, which request may be made at any time prior to or within one week after the hearing.

(B) A taxpayer, or the taxpayer's representative, may make an audio recording of an oral hearing, if the hearing officer is informed of that fact at least one week prior to the hearing and consents thereto. The department shall have the right to obtain a copy of the recording upon request, which request may be made at any time prior to or within one week after the hearing.

(C) If the hearing officer determines that a recording of an oral hearing is disruptive, the recording shall be terminated immediately.

(8) Witnesses and Documentary Evidence. At an oral hearing, taxpayers, or the taxpayer's representatives, may present witnesses and/or offer documentary evidence in support of their position.

(A) Witnesses.

1. Oral testimony will be evaluated by the hearing officer in making a determination on the protest. Oral testimony will be used for no purpose other than a determination of the protest. Oral testimony does not need to be under oath. No official transcript is prepared of the hearing. The taxpayer, or the taxpayer's representative, is required to inform the hearing officer of the names and identities of witnesses who will be present at the hearing at least one week prior to the hearing. However, the hearing officer may, but is not required to, allow witnesses who have not been previously identified to offer testimony.

2. The hearing officer may limit testimony of witnesses if and when the hearing officer determines the testimony to be repetitious, redundant, or irrelevant.

3. The department will not issue subpoenas on behalf of a taxpayer to compel witnesses to appear at an oral hearing.

(B) Documentary Evidence.

1. Except as otherwise provided in subsection (h)(9) of this regulation, with respect to testimony contained in a recording, a copy of any documentary evidence offered in support of the taxpayer's position shall be supplied to the hearing officer at, or prior to, the hearing. The department may, but is not required to, retain such documentary evidence for its files.

2. Documents or recorded testimony submitted during the consideration of the protest may be offered by the department in subsequent proceedings subject to the rules of evidence applicable to that body.

(9) Submission of Additional Information. At the conclusion of, or during, the hearing, the hearing officer may conclude that additional information is necessary in the determination of the protest. The taxpayer, or the taxpayer's representative, will be provided a letter detailing the additional information that the hearing officer needs, as soon as practical after the hearing. The taxpayer, or the taxpayer's representative, shall be given 30 days from the date of the letter, or such other reasonable time as the taxpayer, or the taxpayer's representative, and the hearing officer may agree to, for submission of such information. Failure to submit requested information can result in the protest being decided by resolving questions of fact to which the requests relate against the taxpayer. In addition, failure to provide a timely and complete response may give rise to the assertion by the department, subsequently in administration or judicial proceedings, of a failure to exhaust administrative remedies.

(10) Termination of Hearing. The hearing officer shall have the authority to terminate an oral hearing. An oral hearing shall be terminated only after the hearing officer has provided a warning to the taxpayer, or the taxpayer's representative, including the reasons for termination of the hearing. Grounds for terminating an oral hearing include, but are not limited to:

(A) the taxpayer, the taxpayer's representative, or any other individual, persist in making repetitious or irrelevant discussions of legal or technical points or issues, or attempts to raise issues or points not contained in the original protest as allowed to be amended or perfected pursuant to this regulation and Regulation Section 19041, or

(B) the taxpayer, the taxpayer's representative, or any other individual permitted to be at the hearing by the taxpayer, behaves in a disruptive manner.

(11) Report of Hearing. A report of hearing may be prepared for internal use. The department normally will not provide the taxpayer, or the taxpayer's representative, with a copy of the report prepared by the hearing officer.

(12) Recommendation of the Hearing Officer. Unless expressly waived by the taxpayer, or the taxpayer's representative, notification of the recommendation of the hearing officer with respect to the protest will be mailed to the taxpayer, or taxpayer's representative, within a reasonable period of time. The taxpayer, or the taxpayer's representative, will be given a reasonable period of time to respond to the recommendation of the hearing officer. Thereafter, the department will make a determination on the protest. The recommendation of the hearing officer may be treated as the letter of determination. See Regulation Section 19041(h).

(i) Failure to Attend Hearing.

(1) Good Cause. If a taxpayer, or a taxpayer's representative, fails to attend a scheduled hearing, the taxpayer shall be deemed to have waived the right to an oral hearing unless good cause, not within the taxpayer's, or the taxpayer's representative's, control, exists for failure to

attend the hearing. The hearing officer will determine whether good cause existed. If good cause exists, the oral hearing shall be rescheduled as soon as practical.

(2) Absence of Good Cause. The department may, in its discretion, grant an oral hearing. See subsection (i)(3) of this regulation.

(3) The department, in its discretion, may require that an oral hearing granted or rescheduled pursuant to subsections (d)(5) and (d)(6) shall be held in Sacramento.

Note: Authority Cited: Section 19503, Revenue and Taxation Code. Reference: Section 19044, Revenue and Taxation Code